No. 332.
Br. of Cochran for Appellee
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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 332.

THE PUT-IN-BAY WATER WORKS, LIGHT AND RAILWAY COMPANY,

Appellant.

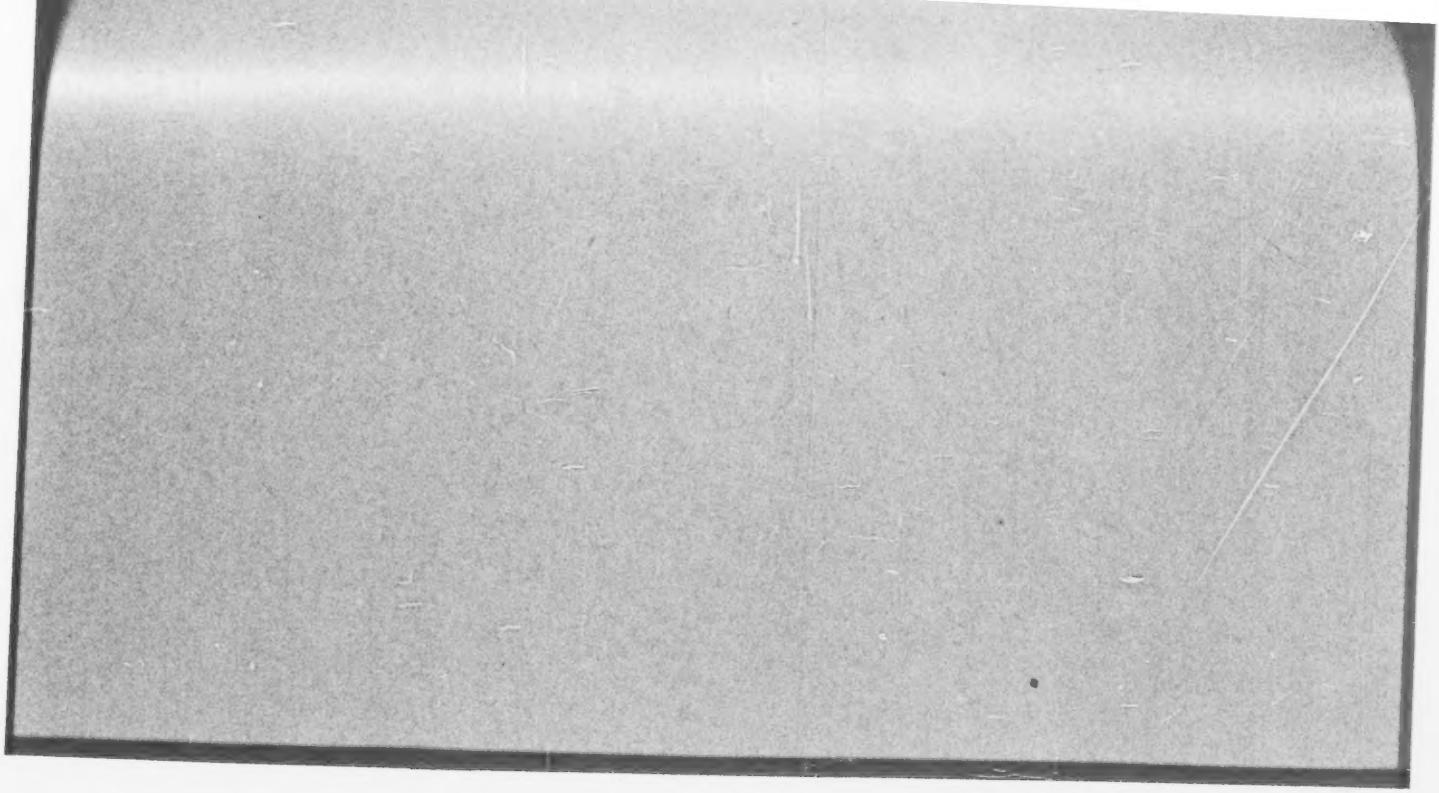
vs.

CHARLES W. RYAN, ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR WALKER P. HALL, APPELLEE.

WILLIAM C. COCHRAN,
ATTORNEY FOR WALKER P. HALL,
Owner of Receiver's Certificates.



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STATEMENT OF FACTS.

Before being influenced too much by Appellant's appeal to their sympathies it would be well for the Court to consider some facts relating to (1) the organization and history of the Put-in-Bay Water Works, Light and Railway Co.; (2) the manner in which its railway, power house and other appliances were built and furnished; (3) the manner in which the present holders of a majority of the stock became possessed of it and the amount paid for it; (4) the necessity for the issue of receiver's certificates; and (5) the opportunities appellant had for recovering its property before a sale was ordered to pay the certificates.

I.

The Put-in-Bay Water Works, Light and Railway Co. was never properly organized under the laws of Ohio. Not a dollar of its stock was ever subscribed and paid for in accordance with those laws, and the company, as such, never had a dollar of cash capital. Its authorized capital stock was $150,000, all of which was retained except five shares, which was gratuitously distributed for the purpose of organizing said company. [Record pp. 6, 21, 55, 56.] Mr. Tillotson subscribed for 150 shares, of the par value of $15,000, but never paid for the same; never intended to do so; and was excused by the company from doing so. [Record p. 6.] Thus, without any *bona fide* subscription for its stock, and without any payment on account thereof, this company assumed to do business which, under the statutes of Ohio, it was not authorized to transact until ten per cent. of its stock was subscribed, and ten per cent. of the amount subscribed was paid in. [Rev. Stat. Ohio §§ 3243, 3244.]

Instead of securing capital through stock subscriptions to pay for the construction of its power house, railway, etc., the board of directors authorized an issue of $125,000 first mortage bonds "for the purpose of procuring means to construct said railway," etc. [Record pp. 6, 22, 56.] This, too, was unauthorized by statute which provides that the amount of bonds issued shall not exceed *two-thirds of its capital stock actually subscribed*. [R. S. Ohio § 3286.] They then agreed with Tillotson for the construction of the "electric railway and power house and all other structures and machinery necessary for the completion and operation of" * * * its "railway, water works and electric light works," and "in consideration of the construction and completion of said railway by the said Tillotson," agreed to *turn over* to him, "the capital stock and the bonds of said company as alleged in said answer and cross bill" of Tillotson. [Record pp. 6, 22, 32, 33, 56.] And, as Tillotson avers and the Circuit Court of Appeals finds, Tillotson and the company were one and the same thing; [Record pp. 6, 56.] and continued to be one and the same thing down to July 25, 1892, when John P. Carrothers became the whole thing. [Record, pp, 9, 20, 24, 34, 35.] Neither one of them paid to the company any thing for the stock held by him.

II

Tillotson was elected Vice-President and General Manager of the company and, as such, contracted with all the lienholders for the

lands, labor and material which were procured for and entered into the construction of its railway and plant and operated the same until July 25th, 1892. [Record pp. 2, 16, 18, 19, 22 to 24, 32, 34, 37, 49.]

The company is estopped by its own answer in the case from denying that,

"The said defendant, Tillotson, undertook the construction of said railway solely in the name of said company; that all material bought by him was purchased in the name of said company and was made an obligation against the same. That all contracts and agreements of every kind made by the said defendant, Tillotson, in the construction of said railway were so made in the name of said company and were made a charge and a liability against said company and, in no instance, did the said Tillotson, attempt to purchase material or construct said railway in his own name" * * * "in the *partial construction* of said railway line created obligations not only to the plaintiff herein, but to various other parties, in the name of said company; that *said claims have not been paid and that said parties have taken the necessary steps to complete mechanics' liens against the property of said defendant to secure them for material as aforesaid.*" [Record pp. 23.] See also affidavit of John P. Carrothers, President, [Record p. 36.]

Surely no argument is necessary to show that the equities of the creditors and lienholders are superior to those of the company and the present holders of a majority of its stock, who got it, rightfully or wrongfully, from J. K. Tillotson, subject to all its infirmities in his hands. No lienholders have taken exceptions to the action of the court below.

III.

How did the present holders of the majority stock acquire it, and what did they pay for it, to Tillotson, or any one else?

It seems from Tillotson's cross bill that the defendant, John P. Carrothers, now posing as the President of the Put-in-Bay Water Works, Light and Railway Co., represented that he and his friend H. H. Warner, of New York, a man who has obtained considerable notoriety as a financier, had organized a company known as The Industrial and Mining Guaranty Co., and were prepared to negotiate the sale of stocks and bonds in New York City, and that Tillotson made a contract with them in his own name and in the name of the company by the terms of which they agreed to negotiate and sell $125,000 of the first mortgage bonds of the company, and to pay certain claims and

advance to Tillotson at specified dates certain sums of money aggregating $95,250, and thereupon Tillotson deposited with them $100,000 of the capital stock of the company to become their absolute property when all of the stipulated payments should be made, and the whole issue of $125,000 of its first mortgage bonds, and Tillotson avers that they wholly failed to carry out their contract with him, and have not negotiated or sold any of the said bonds or accounted to him for them, and that the total amount received by him was only $15,000, which he received in sight drafts at the time he made the deposit of stock and bonds; [Record, pp. 7, 8.] that he is still the owner of the $100,000 of stock deposited with the Industrial and Mining Guaranty Co. and that Carrothers, under the claim that he is the owner of said $100,000 of stock elected himself President [Record, p. 9.] He attaches a copy of the contract to his bill marked Exhibit A, which appellant identifies and admits to be correct but has not seen fit to make a part of the record. [Record, pp. 9, 23.]

The allegations of Tillotson are not seriously controverted, but John P. Carrothers and The Put-in-Bay Water Works, Light and Railway Co. set up as an excuse for non-performance of the contract, misrepresentations on the part of Tillotson as to the title and condition of the property, its complete construction, &c., and say that Carrothers became the President of the company by the unanimous vote of the stockholders, July 25, 1892, and immediately took steps to oust the possession of Tillotson, which result was accomplished September 3, 1892. [Record pp. 19, 20, 24, 25, 34, 35, 36.] There is no satisfactory explanation of how Carrothers, individually, became possessed of the $100,000 stock of the company or entitled to vote. If the contract was void on the ground of fraud, and rescinded by them on that ground, it is not perceived how he and his associates could hold the stock and bonds except as security for the repayment of the $15,000 cash advanced.

Irrespective of the merits of the case, as between Tillotson, Carrothers, The Industrial and Mining Guaranty Co. and The Put-in-Bay, &c., Co., it would seem that the equities of the lienholders, who had furnished all the labor and materials for constructing the railway and plant and expended, between them, many times $15,000, were superior to that of any of the parties wrangling for the possession and right to vote the stock of the company, which, as before stated, was never subscribed and paid for.

IV.

Was there any necessity for issuing Receiver's Certificates after the court took possession of the road through its Receiver, September 10th, 1892?

The first application of the Receiver for authority to issue Receiver's Certificates, filed October 15, 1892, sets forth that he took immediate possession of the property and found:

"four electric motor cars standing upon said track without shelter and exposed to the weather; four "trailing cars," to be used in connection with the said motor cars, which are standing upon an old dock in the yards of the Wabash Railway Company in Toledo, Ohio, without cover and exposed to the weather and subject to charges for freight from St. Louis to Toledo, demurrage and cost of unloading," that "it will be necessary for said receiver to store said cars and protect them from the weather during the coming winter, and care for and protect the engines, dynamos, motors and other apparatus and machinery incident to said railway, and to erect a building and employ labor for that purpose."

He states the probable cost of such necessary improvements and the storage and care of the property during the winter, and asks that he may be authorized to issue and dispose of $5,000 Receiver's Certificates at not less than par. [Record, pp. 28-30.]

The second application, filed Dec. 21, 1892, recites that the Receiver has expended the proceeds of the $5000 already authorized:

"in constructing a car house for the protection of the cars of the defendant, The Put-in-Bay W. W., L. & Ry. Co., properly caring for the engine, dynamos and other appurtenances of said defendant, paying freight charges and demurrage, cos. of shipping four cars from Toledo to Put-in-Bay and payment of labor claims under the order of this court" * * * "that there are a large number of labor claims yet unpaid, for which there is no money available in the hands of said Receiver and no money to pay for the care of the property in his hands as Receiver during the coming winter,"

and asks for authority to issue $5,000 more certificates to be sold at not less than par, etc. [Record pp. 43, 44.]

The facts recited in these applications have never been controverted. On the contrary, the answers and cross bills of Tillotson, Carrothers and The Put-in-Bay W. W., L. & Ry. Co., all admit and aver that the road and plant were not complete at the time the property came into the hands of the court. [Record pp. 9, 20, 23, 24,

25, 36.] Carrothers makes an affidavit which was filed Oct. 20, 1892, in which he swears:

"that said road was not completed either in whole or in part, and affiant says that it will take at least twenty thousand dollars to complete the construction of said road." [Record p. 36.]

This would seem to leave open no question as to the necessity for the issue of Receiver's certificates to complete and care for the property.

V.

When the Circuit Court of Appeals for the Sixth Circuit had this case before it on the appeal of the Industrial & Mining Guaranty Co., from the order of the Circuit Court continuing in force an injunction against its disposing of the stock and bonds in dispute, it reversed the Circuit Court and directed that the injunction should be dissolved on the ground that it had been shown that the amount involved was not sufficient to give the Court jurisdiction, that the suit was collusively brought, etc. Recognizing the fact that receiver's certificates had been issued and sold to *bona fide* purchasers, who relied in good faith on the orders of the Court authorizing the same, the Court, while making no orders touching the same, express an opinion as to what should be done by the Circuit Court before dismissing the bill.

"With reference to the receiver's certificates, issued under the order of the Circuit Court, so far as the same have been negotiated and their proceeds applied to the preservation and protection of the property pending this litigation, the discharge of liens thereon and indebtedness owing by the Put-in-Bay Company for labor which has accrued before this suit, all just and reasonable expenditures should be allowed to the receiver as made in the common interest of all concerned in the property. An order should be entered in the cause requiring the receiver to render a full and detailed account of his expenditures, the purposes for which, the persons to whom, and the dates when the same were made and referring it to a master to examine and report upon said accounting."

All of this, with a view to making such order as to costs as shall be just. [Record pp. 66, 67.]

Judge Taft says:

"While I fully concur in the view that the Circuit Court before

dismissing the bill for want of jurisdiction, may require payment of the reasonable expenses incurred in the care and preservation of the property taken within its custody, I do not think we can make any order on this appeal touching the matter." [Record p. 68.]

When the case was remanded, a motion to dismiss for want of jurisdiction was filed on behalf of Appellant, The Industrial and Mining Guaranty Co. and John P. Carrothers. The attorneys appearing for these parties respectively were J. B. Foraker, E. W. Tolerton and Brown & Geddes. [Record p. 69.] Upon the hearing of this motion, the Court ordered a reference to a master to examine the accounts of the receiver "with particular reference to the disposition made by the receiver of the proceeds of the receiver's certificates," etc. [Record pp. 70, 71.]

On March 31, 1894, the master reported. Among other things he says:

"I have been attended by the parties interested in these matters embraced in this reference, to-wit: The Put-in-Bay Water Works, Light and Railway Co., The Industrial & Mining Guaranty Co., and John P. Carrothers, and J. K. Tillotson and their respective counsel, and have taken proofs upon the matter at issue and do report and find as follows, to-wit: * * * *

"The following I find to be a correct statement of the receipts and expenditures of said Receiver, to wit:

RECEIPTS.

From proceeds of receiver's certificates	$8,776.10
One ninety days note	53.46
Earnings of Railway	3,330.30
Other Sources	71.04
	$12,230.90

EXPENDITURES.

Construction	$2,905.05
Power-house	212.45
Track	85.28
Betterments	663.55
Operating Expenses	3,138.98
Insurance	198.95
Care of Property	910.89
Labor Claims	3,326.43
Payment receiver's certificate No. 1 with interest	528.00
	$11,969.58
Cash on hand	261.32
	$12,230.90

"I find that the reasonable compensation to which the Receiver is entitled for his services as such is $2,200—twelve hundred dollars of which sum is for his personal services and one thousand dollars for his attorney fees, paid to Doyle, Scott & Lewis.

"The foregoing findings as to the report of the receiver and his compensation is made after hearing proofs relative thereto, and *by agreement and consent of parties made by counsel at such hearing the same are to be approved and confirmed.*" [Record pp. 71, 72.]

This settles, once for all, the question of the proper application of the proceeds of the receiver's certificates, and all subsequent motions and references with a view to contesting the facts thus admitted were an abuse of the patience of the court and the rights of the parties.

On June 12, 1894, the court entered an order of conditional dismissal of the case, which is endorsed by the attorneys for Carrothers and The Put-in-Bay Water Works, Light and Railway Co., and bears internal evidence that it was consented to by all parties. It provides:

"that upon the payment into court of the amount due on the certificates issued by L. S. Baumgardner, heretofore appointed receiver herein, or the filing herein of said certificates duly paid and cancelled on or before the 30th day of June, 1894, and the payment to the clerk of this court of the costs, in this case, including the compensation of the receiver, which is now taxed at the sum of $1,200, and the compensation of receiver's counsel, which is taxed at the sum of $1,000, said cause be and the same is hereby dismissed.

"And it being made to appear to the court that amounts due J. B. Foraker, Brown & Geddes and E. W. Tolerton," (these are the attorneys for The Put-in-Bay, &c., Co., John P. Carrothers and The Industrial and Mining Guaranty Co.,) "as reported by the master heretofore appointed herein have been fully paid and satisfied, it is ordered that the injunction bond heretofore filed herein be cancelled, and that the parties to said bond be and they are hereby discharged from any liability thereon, and said bond may be withdrawn from the files." [Record, p. 74.]

This was opportunity No. 1 for the company to repossess itself of its property upon the payment of the receiver's certificates and the costs of court, including receiver's compensation and counsel fees, all of which were fixed with the approval of the company's attorney. The company did not avail itself of the opportunity, though it had boasted of its solvency and ability to complete the road and pay and discharge all liens and obligations existing against the property of said company. [Record pp. 20, 24, 25.]

Instead of so doing, the company procures new counsel and,

before a new judge designated to hear the case, proceeds to file and argue motions to dismiss for want of jurisdiction, and to attack the validity of the receiver's certificates, just as if these matters had not been heard and determined. Finally, on June 26, 1896, the company files a petition for the possession of its property in which it represents:

"that it is ready and willing and hereby tenders to the Court a good and sufficient bond for the payment of all charges incurred in said receivership, that may be finally determined a first or prior lien upon the property of your petitioner."]Record, p. 83.]

And prays for an order on the receiver to deliver the property to it.

"Upon the filing by your petitioner of the bond hereinbefore tendered and the approval thereof by the Court." [Record, p. 84.]

And the Court, in its anxiety to hand back to the company its property, chose to overlook all previous findings and orders and the failure of the company to comply with their conditions, and entered another conditional order, in accordance with the prayer of the petition:

"that upon the said respondent, the Put-in-Bay Water Works Light and Railway Company, giving its certain bond to the clerk of this court, for the use and benefit of the parties who may hereafter be found entitled thereto in the sum of twenty thousand dollars and with sureties to be approved by the clerk of this court and having therein the following conditions, to-wit: that the obligors of said bond bind themselves to secure the payment of all charges incurred in the receivership in this action, including his certificates aforesaid, which may finally be determined to be a lieu upon the property of said respondent," etc. * * * "said receiver turn over to said defendant company, all the property of said defendant now in his hands as such receiver, including its railroad." [Record pp. 85, 86.]

This was opportunity No. 2, granted in exact accordance with the terms of the company's own petition, and, again, the company proved itself to be a trifler and incapable of complying with the conditions which it had itself laid down.

In April, 1897, after fair warning to the company, this order was set aside, because the bond, which the company said it was "ready and willing" to furnish, was not filed. [Record p. 87.]

THE QUESTION OF JURISDICTION.

Having disposed of the idea that there was anything like ill will, or oppression in the court's treatment of appellant, we may now consider calmly, the questions of the court's jurisdiction, and the right and duty of the court to order a sale of the property to pay the receiver's certificates.

In the original Bill of Complaint, diversity of citizenship is alleged. The amount in controversy is said to be $2,787.04, as set forth in a detailed statement of account duly attached, the complainant asserts that he has obtained a statutory lien on the property for the whole amount, invokes the aid of a court of equity to enforce his lien and makes other lien holders and persons claiming an interest in the property parties to the suit, and prays that they may be required to appear and set up their respective claims or interest. [Record, pp. 1 to 3.] All of the parties named as defendants did have liens or claimed an interest in the property, and all were properly made defendants.

On the facts set out in this bill, there can be no question of the jurisdiction of the court. And, we take it for granted that, if complainant had a *right* to proceed in the U. S. Circuit Court to enforce his claim, his *motives* for going into that court will not be inquired into.

When and how, if at all, was it made to "appear to the satisfaction of such Circuit Court" * * * * that such suit did not "really and substantially involve a dispute or controversy properly within" its jurisdiction, "or that the parties to said suit had been improperly or collusively made or joined, either as complainants or defendants, for the purpose of *creating* a case cognizable" by it?

The answer of The Put-in-Bay Water Works, Light and Railway Co., filed September 26, 1892, admits the contract of complainant with itself "through its Vice-President, the defendant, J. K. Tillotson," to sell and deliver certain materials to be used in the construction of its railway, but denies that all the supplies and materials named in the account "*were used in the construction of said railway*," and says "that a large part of said materials were sold and delivered to said defendant, J. K. Tillotson, for the purpose of being used and were used in the construction of certain property known as "Hotel Victory;" denies that the goods were of the value of $2,787.04, but admits that complainant obtained a lien for the whole amount, and, by implication, that such lien was a proper one to the extent that such material was used in the construction of its railway, and then adds:

"and such lien was so filed by said complainant at the request of said Tillotson, for said amount, and for the express purpose of instituting this action in this court."

No plea to the jurisdiction of the Court is interposed, but the company prays:

"That this honorable court may take an account of material sold by complainant to and for the use of the defendant *to be used in the construction of said railway*, and the amount of said material so sold, which has actually been used in the construction thereof, and that the court may further determine the value of said material so sold to and used by this defendant, and the actual amount of the lien which said complainant has on account thereof against the property of this defendant." [Record, pp. 16, 17.]

This answer could not affect the jurisdiction any more than any general denial or dispute as to the amount due. The Put-in-Bay etc. Co. was a "light" company as well as a "railway" company, and material might well be sold to it it and used by it for lighting Hotel Victory, all of which would be properly chargeable to it.

In the company's answer to the "cross-bill" of Tillotson, filed the same day, the company asserts that its articles of incorporation

"authorized it to construct and operate an electric railway, water works and lighting apparatus on South Bass Island." [Record p. 21.] And further asserts:

"That *all material bought by him*" (Tillotson) "was purchased in the name of said company and was made an obligation against the same." * * * "That said defendant in the partial construction of said railway line created obligations, *not only to the plaintiff herein*, but to various other parties in the name of said company; that said claims have not been paid and that said parties have taken steps to complete mechanic's liens against the property of said company," etc. [Record p. 23.]

A question of law might be raised as to whether complainant's lien was a valid one as to such property, granting that the material used in the Hotel Victory was so sold and delivered to it, but this was a question which could only be determined on a final hearing on the merits.

The fact that the answer *disputes* the amount claimed does not divest the Court of jurisdiction. It is the *amount in dispute* which gives jurisdiction.

Schunk v. Moline, &c. Co., 147 U. S., 500, 504.

"Whether the defendants could lawfully recover it against the plaintiff in this case was a matter affecting the *merits* and not the jurisdiction."

Dushane v. Benedict, 120 U. S., 630, 636.

Admitting that part of the amout claimed is due, without paying or offering to pay does not deprive the Court of jurisdiction.

Fuller v. Metropolitan L. Ins. Co., 37 Fed., 164.
See also
Butcher's &c. Co. v. Louisville &c. Co., 67 Fed., 39, 40.
Kunkel v. Brown, 99 Fed., 593, 595.
Pine v. Mayor, &c., 103 Fed., 337, 338.

The matter stood thus until Oct. 29, 1892, (the rule days for answers and replications not having arrived) when the Industrial & Mining Guaranty Co., filed a motion to dissolve the temporary injunction against disposing of the bonds and stock in its possession, and The Put-in-Bay Co. filed a motion to discharge the receiver. The grounds for both motions were: (1.) That no notice of the application for the injunction, or appointment, was given to the defendants. (2.) That the averments of Tillotson's answer and cross-bill were untrue. [Record pp. 31, 32.]

There is not a suggestion of want of jurisdiction of the case and affidavits or counter affidavits on such a question could not be expected and would not be relevant.

The affidavit of Mr. Carrothers in support of the motions, filed the same day, goes over the controversy between Tillotson, The Put-in-Bay, etc. Co. and The Industrial etc. Co., at great length, but there is no allusion in it to the court's want of jurisdiction or to any facts which would tend to impeach it. [Record, pp. 32 to 38.]

He alludes to "a restraining order" obtained in the State court to prevent Tillotson from interfering with the company's possession and control of its railway and attaches a copy of the order. [Record, pp. 37 to 39.]

The order is *conditioned* upon the company's giving an undertaking in the sum of $5,000 and it is nowhere asserted that such bond was given. The clerk who verifies the copy of the order and to whose satisfaction the bond was to be given, is signifiantly silent, as to whether or not any bond was given. [Record, p. 39.] The absence of this important item of evidence and the course of the company with

regard to the bond it tendered and was "ready and willing" to give in this case—but never did—lead to the presumption that no bond was given in the Common Pleas Court. That, however, is a matter which could not in any way affect the jurisdiction of the Circuit Court in a suit brought to marshal and enforce liens brought against all parties having an interest in the property.

The discussion of the hearing of suits commenced in the Common Pleas Court of Ottawa County, Ohio, in Mr. Hamilton's brief is so full and elaborate that we would add but a single remark. In neither of these suits was there an attempt to marshal and enforce liens against the property, and in neither of them did the Court itself take *possession* or control of the property. There was absolutely nothing to prevent any lienholder's going into the U. S. Circuit Court to enforce his lien, and to draw into that suit all parties having conflicting claims. Suits brought against Tillotson to prevent his factious and illegal interference with the possession and operation of the railway, and to recover motor cranks and pins carried off by him, [Record p. 35;] could not bar *him* from asserting any claim he had against the company or any lien upon its property.

The authorities cited by Appellant's Counsel, [Brief pp. 35 to 37,] are not in point.

On Nov. 12, 1892, an affidavit of F. S. Terry was filed in which he states that he is the manager and attorney in fact of the complainant company, located and doing business in Chicago; that this company had a claim against The Put-in-Bay Co. for $2,787.04 and on Sept. 6, 1892 was advised by L. G. Richardson, a Toledo attorney, to file a lien against The Put-in-Bay Co. for the amount of its claim and authorize him to bring suit against the company; that the material actually used in the construction of the railway amounted to $861.23; that the balance amounting to $1,925.81 was used inside of Hotel Victory;

"*That all of said material was ordered by the said defendant, J. K. Tillotson, as vice-president of said defendant corporation; that it was shipped to the said defendant corporation and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Water Works, Light and Railway Co.* [Record, p. 41.]

The exhibits attached show that there was another claim against the Hotel Co., which was not included in the above. [Record p. 42.] They also show that complainant was solicitious about his claim and did not bring the suit merely to accommodate Mr. Tillotson or, in the language of Terry's affidavit, "for the purpose of

enabling the defendant, J. K. Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed.

There can be no question that under the statute, before a Court is required to dismiss a cause for want of jurisdiction, it must "*appear*" and "*appear to the satisfaction of such Circuit Court*," that it has no jurisdiction.

The mere filing of an affidavit in support of a motion in the case, which is *not a motion to dismiss for want of jurisdiction*, can hardly be said to call the attention of the Court, much less to *satisfy* it that it had no jurisdiction. An issue should be raised in some way, by plea to the jurisdiction, or motion to dismiss, and proofs taken with respect to such issue, before the Court can be expected to act and satisfy itself on the question of jurisdiction. Judge Taft recognized this when he said in his opinion:

"It may be that the jurisdictional question involved should be regularly raised upon the record by plea or otherwise." [Record p. 67.]

And counsel for appellant recognized the necessity for it, by filing such a motion Dec. 5, 1893. This was the first step taken, so far as the record shows, to call the attention of the Circuit Court to its want of jurisdiction, and this was nearly a year after the last of the receiver's certificates had been issued and sold, and the proceeds applied to the construction of a car house, the payment of labor claims, and the care of the property.

In Barry v. Edmunds, 116 U. S:, 550, 559, the court says:

" It might happen that the judge, in the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But, upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a *legal certainty* of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.' "

and reversed the action of the court below in dismissing a case for want of jurisdiction.

In Hartog v. Memory, 116 U. S., 588, 590, Waite, C. J., says:

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction, that the court can dismiss the case upon the motion of either party."

These cases are cited with approval in the recent case of Wetmore v. Rymer, 169 U. S., 115, 122, and this court restates as law [p. 128:]

"that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a *legal certainty* of that conclusion,"

and reversed the decision of the court below; dismissing the case for want of jurisdiction.

It is clear under these cases that the benefit of the doubt must be in favor of the jurisdiction, and when the judge is not persuaded, even in his own mind, that there is want of jurisdiction, he has no business to dismiss a case because a *suspicion* has been raised by an *ex parte* affidavit.

The court might well be excused for not feeling *satisfied* that its jurisdiction was improperly invoked, even if its attention had been directed to that question. The affidavit of Terry might well fail to *satisfy* the court for several reasons. (1) It was *ex parte* with no opportunity to cross examine. (2) Any volunteer statement of a party that he had perjured himself when he filed his lien and afterwards when he filed his bill of complaint, would justly be viewed with suspicion. (3) The confession that "the petition was verified by the representative of this plaintiff corporation." [Record, p. 41.] was false. The "representative" mentioned was one who was advised by its attorney and therefore could not have been the attorney himself. No such representative verified the petition. [Record, p. 3.]. (4) The false swearing is said to have been done in the first instance, because "they were unaware that the said defendant corporation had been reorganized on the 25th day of July, 1892 and that the said J. K. Tillotson, had been voted out of office by the directors. [Record, pp. 40, 41.] This would seem to be a good ground for swearing falsely in the *second* instance, rather than the *first*, and currying favor with

"the powers that be." (5) The facts stated:

"*That all of said material was ordered by the said defendant, J. K. Tillotson, as vice president of said defendant corporation; that it was shipped to the said defendant corporation, and was charged upon the books of the plaintiff corporation to the said Put-in-Bay Water Works, Light and Railway Company.*" [Record, p. 41.]

the letter of the complainant to Richardson, attached to the affidavit:

"Did you file the lien and is our account secured? We note the appointment of a receiver for the hotel and presume that *our little account there* is lost. We hope, however, that the account against the railway company is not at all hazardous." [Record p. 42.]

And Richardson's reply:

"I filed your lien against the Put-in Bay Water Works, Light and Railway Co. for record," etc. * * * "I think your claim is perfectly safe and will keep you posted as anything turns up." * * * "I wish you would *mail me a copy of your account against the Hotel Co.*, that I may prepare the necessary affidavit and file with the recorder." [Record p. 42.]

are consistent with the allegations of the Bill of Complaint and the *bona fides* of the proceeding and inconsistent with the other statements in the affidavit that the claim was false and the suit brought merely to enable the defendant, J. K. Tillotson, to file therein his cross-petition for the purpose of having a receiver appointed.

It is perfectly clear that complainant had an account against the Hotel, which was not included in the account or lien against The Put-in-Bay Co.

The whole affidavit is of such a character as disgusts a right-minded man and the Court would naturally attach no importance whatever to its statements. It does not require contradictory affidavits to rebut so plain a fabrication to suit the needs of Mr. Carrothers in his controversy with Tillotson.

If complainant had a valid claim against The Put-in-Bay Water Works, Light & Railway Co., for $2,787.04, about which there can be no dispute, even on Terry's affidavit, it had a right to bring an action at law in the U. S. Circuit Court. If it had procured a lien on the property for that amount, which appears from this affidavit, as well as the Bill of Complaint, to be true—it had the right to come into the U.

S. Circuit Court, as a court of equity, to enforce its lien and ask for the sale of the property, marshaling of liens and payment of its claim in its proper order, and, when it did so come, *the court had jurisdiction to hear and determine.*

The Circuit Court of Appeals thought differently, probably because counsel for the various lienholders were indifferent as to whether the suit was dismissed or not, (the Receiver and the holder of the Receiver's certificates were not represented), and did not argue the question of jurisdiction and analyze this wonderful affidavit.

All of these proceedings after that were had in strict conformity with the opinion of the Circuit Court of Appeals for the Sixth Circuit and were so regarded by that Court, when a writ of mandamus was asked for in that Court.

In re The Put-in-Bay Water Works, Light and Railway Co., 90 Fed., 831.

If the intention of this appeal is to review the decision of that Court, on the question of jurisdiction and dismissal, we submit that it cannot be done in this way.

Aspen Mining, &c. Co. v. Billings, 150 U. S., 31, 37.

If the original opinion and action of the Circuit Court, prior to and unaffected by the decision of the Circuit Court of Appeals, is the subject of inquiry, we submit that the Circuit Court was right in declining to dismiss the case for want of jurisdiction upon the filing of Terry's affidavit, no such issue having been presented by plea or motion to dismiss, and the affidavit being subject to the suspicion and criticism we have mentioned.

NECESSITY FOR A SALE TO PAY THE RECEIVER'S CERTIFICATES.

But, assuming for the sake of argument, that the court should have refused to proceed further, and should have dismissed the suit, the judge was required by the statute to "*make such order as to costs as shall be just.*"

Before the motions to dissolve the injunction and to discharge the receiver were filed, before these *ex parte* affidavits were filed, the court had, on evidence that was deemed sufficient, authorized the receiver to issue and dispose of $5000 certificates.

"the proceeds to be used in the proper care and preservation of the property in his hands as receiver;"

and the order made them :

"a lien upon the property of said railway company in the hands of said receiver, superior and prior to all other liens, excepting only costs and expenses of this action." [Record, p. 30.]

and they were purchased for full value by innocent purchasers, relying on the order of the court.

The $5000 realized from the sale of the first certificates proving insufficient for the purpose authorized and the payment of labor claims ordered by the court, the receiver applied for authority to negotiate and sell $5000 more and received it December 22, 1892. [Record, pp. 43, 45.]

Under this additional authority certificates to the amount of $3,776.10 were issued and one certificate of the first issue, amounting to $500, was paid, leaving outstanding $8,276.10. [Record. p. 72.]

The necessity for their issue and the proper application of the proceeds have already been discussed [ante p. 5.] There is nothing in the record that would enable this court to review those questions, even if appellant had asked it to do so. It must be conclusively presumed that there was a necessity for their issue and that the proceeds were properly applied in the care and preservation of the property and discharge of preferred claims against it.

The validity of Mr. Hall's purchase and holding of these certificates was attacked by Arbuckle, Ryan & Co. [Record, p. 75.] and after a full hearing on the pleadings and evidence, and argument by counsel, the court found :

"That the said Walker P. Hall purchased said receiver's certificates for full value and in good faith relying upon the orders of this court and is the present holder thereof, that the same have not been paid, nor has anything been paid to the said Walker P. Hall on account thereof and that they are still a first lien upon all of the property and franchises of the defendant company, The Put-in-Bay Water Works, Light and Railway Company, and that said cross-petitioners are not entitled to have said cause dismissed until said receiver's certificates and expenses and the costs of this cause are paid in full." [Record p. 76.]

This finding also cannot be reviewed in this Court, because the evidence on which it was based is not made a part of the record.

We are then brought face to face with the remarkable proposition that a Court of Equity having, at a time when its jurisdiction was apparent on the face of the papers, taken into possession a railway, and power, lighting and water works plant; authorized the issue of receiver's certificates for the completion of the plant, its proper care and preservation and for the payment of labor-claims incurred by the company in the construction and operation of its railway, every dollar realized from which was properly applied and accounted for; and having declared by decretal order that such certificates were a first lien upon all the property of said railway company in the hands of its receiver, in order to induce persons to purchase the certificates, should dismiss the suit and order the receiver to return the property to the railway company without making any provision to reimburse the receiver for his outlay or the holder of the certificates for his money, which had been taken and expended in completing and caring for the property and discharging preferred claims against it.

Such an order would be a travesty on justice, and Courts of Equity would be justly held in contempt if it were possible to make it. The argument proceeds on the theory that the court is in no better position than a highwayman, or trespasser *in delicto*, and that its orders are entitled to no more respect than those of a common criminal.

When did *coram judice* cease to mean anything? When and where has the doctrine been established that a person relies on the orders of a court at his peril?

Will this court, now, for the first time in history, announce such a doctrine?

The argument also ignores the fact that the court assumed jurisdiction of the case and took possession of the property when, on the face of the papers it had not only a right, but a duty to do so. The burden of proving that jurisdiction was improperly assumed was upon defendant, and it was not discharged by filing answers in the case, or filing affidavits to which the attention of the court was not called until December 22, 1892. The mischief had already been done, and the rights of innocent persons, whose money had been used to benefit defendant's property were involved. Five thousand dollars had been expended and $3,276.10 more was absolutely needed to protect the property, for the benefit of all concerned. The court could not hesitate, even if it felt satisfied, then, that its jurisdiction had been improperly invoked. It was not merely a question between parties to the suit, whose rights would remain the same if the suit was dismissed without prejudice. It was a question of the rights of a party who

became interested in the course of the court's exercise of *de facto* jurisdiction, relying upon the orders of the court, made *coram judice*.

The court must, as a matter of equity—as a matter of self respect—protect the holder of the receiver's certificates issued and sold under such circumstances. It must require that the money taken and expended for the common benefit of the company and the lienholders be repaid.

We fully agree with counsel for appellant that the Court should, upon being satisfied that its jurisdiction had been improperly invoked, try to restore things to their former state, and put all parties back in their former positions so far as practicable. [Record p. 44.] Their argument, however, fails to satisfy the sense of justice, when it is limited to putting *appellant* back in its former position, and takes no account of Mr. Hall's former position. Nowhere in appellant's brief is there a suggestion as to how Mr. Hall is to be reimbursed for the money taken from his pockets for the completion and proper care and preservation of the property and the payment of preferred claims.

The Court first ordered that the property should be restored on payment of the Receiver's Certificates and the costs, the amount of which was agreed upon [Ante, p. 8]. It next ordered that the property should be restored to the company on the filing of a bond conditioned on the payment of such amount as should be found to have been properly expended on the company's property [Ante p. 9]. Neither of these orders were complied with, although the second one was entered in response to appellant's petition for such an order.

The reason is plain. The other liens on the property exceeded the amount for which it could be sold and the company could only enjoy its possession, until proper proceedings could be begun in the State Court for foreclosure and sale and the appointment of a receiver. The company had no capital, having given away all its capital stock, and its credit, if it had any, would naturally be at a low ebb in the face of the recorded liens and the prospects of further litigation.

The Court, while awaiting the company's action in the matter, did the best possible thing in leasing the road to the highest bidder, from season to season, and applying the rentals to the continued care and preservation of the property and the payment of interest on the certificates.

Finally, in April, 1897, its patience was exhausted and it became apparent that the company either could not, or would not do anything, until all the mechanics' liens on the property expired by limitation and a new question was forced upon it. Had it the right to

jeopardize the rights of all the lienholders by holding the property, indefinitely, in the hope that the company, which had neglected every opportunity to repossess itself of its property, would some day pay the certificates and take it out of the hands of the Court?

The answer to this seemed plain. Duty seemed to require the immediate sale of the property to pay the receiver's certificates.

Counsel for appellant seem to contend that even if it be considered proper to sell the property to pay the receiver's certificates, it was improper to consider the claims of lienholders or make any orders touching said claims.

They ignore a patent fact in the case, that no sale could be effected, if the property was offered for sale subject to a lot of undetermined liens. The purchaser at such a sale would not get a clear title, but would be immediately subjected to a suit, or perhaps a multitude of suits, to enforce liens against the property which had not been divested by the sale. The fact, even if admitted, that they were inferior liens would not make any difference. The proceedings to hear and determine the rights of the lienholders were ancillary to and rendered necessary by the proceedings to sell the property in its custody to pay the just charges upon it.

The opinion of Judge Severens in this case [Record pp. 93 to 96] is fully sustained by the authorities.

Conwell v. Valley Canal Co., 4 Biss., 195, 200, 212.
Minnesota Co. v. St. Paul Co., 2 Wall., 633.
Gumbel v. Pitkin, 124 U. S., 131.
Compton v. Jessup, 43 Fed., 485, 486; S. C., 68 Fed., 263, 278.
Carey v. Houston Ry. Co., 52 Fed., 671, 675, 676.

The attack on the validity of the receiver's certificates, based on Hanna v. State Trust Co., 70 Fed., 2, and Thompson v. Thompson, 16 Wisc., 94, needs but a word, even if the question is one properly before this Court.

In the first case the authority to issue certificates to improve lands held by a private land company and to make them prior to a mortgage lien on the premises was denied—but authority to issue certificates to improve and preserve the property of a railway company, a common carrier, a quasi public corporation was admitted.

In the second case it is admitted that persons, who improve property in good faith, believing that their title is good may recover the value of their improvements even though an adverse claim is success-

fully asserted. The rights of occupying claimants are everywhere recognized.

We find no case, among all those cited by appellant, in which the authority of a Court, having possession of property like that of The Put-in-Bay Co., to issue receiver's certificates in order to care for and preserve it while it remains in its custody is denied. Mercantile Trust Co. v. Kanawha &c. Ry. Co., 58 Fed., 15, cited by counsel for appellant, [Brief p. 47], is good enough for us.

With all their industry they have failed to find a case which sustains their position, that a Court is bound to ignore the certificates issued while its jurisdiction was apparent and allow the company to receive back its property, improved, preserved, relieved from taxes and labor liens, without making any provision for repaying the holder of the certificates whose money is thus applied for the company's benefit.

CONCLUSIONS.

In conclusion we submit the following propositions applicable to the case, which we believe to be based on the authorities and natural equity, viz:

1. Before a Circuit Court of the United States can dismiss a case for want of jurisdiction it must be satisfied by evidence, directed to some pertinent issued raised on the record, which creates a *legal certainty* that the case did not involve a real controversy within the cognizance of the court.

2. Such legal certainty cannot be said to be produced by a single *ex parte* affidavit of one of the parties, in which he contradicts former affidavits appearing in the records made by himself, contradicts *facts* appearing of record and makes statements and furnishes documents tending to corroborate his former affidavits and to discredit his later affidavit; especially when such affidavit is filed to support motions in which the question of jurisdiction is not raised.

3. When a Court is satisfied by evidence, produced two months after the commencement of a suit, that its jurisdiction has been improperly invoked, it must make such order as to costs as shall be just and may require that receiver's certificates, which have been issued and sold under its orders to complete and properly care for a railway, taken into its possession while in the exercise of apparent jurisdiction over the parties and subject matter, shall be repaid by the owner of the railway as a condition of its restoration, the proceeds of said cer-

tificates having been properly applied to the improvement and preservation of the property, and the discharge of preferred liens upon it.

4. When such owner persistently neglects and refuses for a period of four years, to either pay said certificates or to give bond for the payment of the same and when there is no fund in court from which to pay the same and the party responsible for the suit and the appointment of the receiver becomes insolvent or irresponsible, the court may order the property sold to pay said certificates.

5. As a necessary incident to such a sale, parties having liens upon the property, or claiming an adverse interest in the same, may be allowed to present their respective claims for adjudication and consent to the sale of the property free from their respective liens.

6. The details of such sale and findings and orders with respect to the validity of the certificates, proper application of the proceeds, etc., cannot be reviewed in this court.

7. The order of a Circuit court with respect to costs will not be reviewed or set aside unless there has been a plain abuse of the discretion given to such court by statute.

8. The equities of lienholders and the holders of receiver's certificates, with whose money a railway has been constructed, equipped and properly cared for, are superior to those of the ostensible owner, a corporation which was never properly organized, never had any capital, and never succeeded in borrowing more than $15,000 with which to pay for its construction.

Respectfully submitted,

WILLIAM C. COCHRAN,

ATTORNEY FOR WALKER P. HALL,

Owner of Receiver's Certificates.